

**From:** Ted Cushman  
**To:** Microsoft ATR  
**Date:** 1/23/02 10:57pm  
**Subject:** Proposed Settlement of Microsoft Antitrust Case

Attn:

Renata B. Hesse  
Antitrust Division  
U.S. Department of Justice  
601 D Street NW  
Suite 1200  
Washington, DC 20530-0001

Dear Ms. Hesse,

I am writing to object to the settlement proposed by the government to settle the Microsoft case. The order does no more than to repeat in specific detail the general prohibitions contained in the laws that Microsoft has already broken. There is no reason to have confidence that Microsoft will comply with this order any more than it has complied in the past with the law that the order merely restates with greater specificity. The listing of certain illegal practices from which the company "shall" now refrain is not necessary for the court to put its name to if Microsoft intends to obey the law, and is of no use if Microsoft does not.

Microsoft has repeatedly, publicly, and in the strongest terms defended its past conduct as legal, moral, and even beneficial. It has not been punished in any significant way for previous violations of court orders or of the law. This settlement does not impose any penalty on Microsoft either. So Microsoft has neither an internal motivation to obey the order, nor has it any reason to associate such a violation with significant costs to itself. This order in essence tells Microsoft that it can violate the law with impunity. The settlement is feeble.

The mechanism suggested to accomplish (I will not say "enforce") the putative aim of the settlement -- to wit, a small board of overseers -- would be largely if not wholly ineffective. While I do not believe that Microsoft's management team has any great claim to be excellent creators of software, there is little doubt that they are highly capable and effective business managers and strategists. The company will be able to outfox the overseers with ease, if indeed the overseers are not co-opted before the game even begins. It will be like taking candy from a baby. The settlement is unworkable.

I was prompted to contribute this comment when I noticed an appeal posted by a contributor to the Slashdot internet site, a gathering place for the digitally gifted younger set (especially those who have a liking

for Linux, a freely distributed alternative operating system). I'm not a Linux fan myself, or even a computer freak; I'm a writer who mostly uses the Mac. However, I spend time occasionally browsing the Slashdot site, if only to keep myself humble by noticing the depth of my own ignorance. It's the same curiosity that leads me to read medical journals and other technical matter. Now, unlike most Americans, or (as Microsoft has been fond of pointing out) most law enforcement personnel and most federal judges, the population that posts to Slashdot is very, very, very computer-savvy. These are people who customize their operating systems, or even create operating systems, and who manage large complex networks of computers. My casual reading of the site indicates to me that the vast majority of that highly technical subculture believes implicitly that Microsoft is a monopoly, that Microsoft abuses its monopoly power, and that the abuse by Microsoft of its monopoly power is damaging to those with less power, a category of victims that includes computer users as well as companies unfortunate enough to be recognized by Microsoft as potential competitors. This population also dismisses as unworthy of consideration the notion that a panel of overseers will be able to significantly alter Microsoft's behavior, and would laugh if it didn't hurt at the notion that Microsoft might moderate its anticompetitive practices of the company's own volition.

That group of computer users -- that highly knowledgeable community, whose opinions are representative of the many citizens who would benefit directly from a fair chance for the competitors of Microsoft -- mostly believes that the government's proposed settlement is a politically motivated sellout. The court may or may not care whether its decision in this case is accepted as fair by the populations of technical computer users most affected by the outcome of the Microsoft case. But many distinguished judges have, I gather, felt that achieving a perception of fairness among the public is an important aspect of the jurist's craft. I urge the court to consider the implications of endorsing a settlement that is perceived on its face by the computer software community as a cave-in by the government and a free walk for the violator. The settlement lacks legitimacy.

I will tell you what I favor. I favor the breaking up of Microsoft. It worked with the oil trusts, with the steel monopolies, with the railroad trusts, and with the telephone monopoly. I am sure that in fact, judges do not understand software. Nor should they have to, nor do I believe that judges are deeply knowledgeable about drilling, refining, and distributing oil, or mining, smelting and fabricating steel, or building and managing a telephone network or a railroad. (Computers, after all, are not the only tough technical terrain on the planet.) But judges have broken up companies in all those industries. Heck, my wife is a doctor; she has spent years and years training for it. But if she's sued for malpractice, the case will be heard by a judge who may have never sprayed Bactine on a blister. And that's okay. Microsoft, for their part, does not understand the law; somebody needs to handle that bit for

them.

Look, if I had been married five times, and I had killed the first four wives with an axe, you might not lock me up; you might even leave me living with the fifth wife. But would you let me keep the axe? Microsoft is an unrepentant violator of the law. You can't explain to them nicely what the law means, get them to promise scout's honor, and then drop by twice a week to make sure everything's going fine. They are not going to stop doing what they do until they are unable to do it. And the only way to make that happen is to take away the monopoly power. Then they can do what they love to do -- go for the throat -- and not have to take any guff about it.

Microsoft likes to talk about how competitive the software market is, what a rough world it is, and how they have to be constantly on their toes. And it's true. But Microsoft has never had one experience the rest of the software world has had. Microsoft has never gotten to compete against Microsoft. The court should give them the chance.

Sincerely,

Theodore T. Cushman  
6 Pleasant Court  
Great Barrington, MA 01230  
ted.cushman@verizon.net  
413/644-8928